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October 14, 2016

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: Flat Wireless, LLC v. Cellco Partnership d/b/a Verizon Wireless, EB Docket No. 15-147, File No. EB15-MD-005

Dear Ms. Dortch:

I am enclosing for filing in the above captioned proceeding Verizon's Opposition Brief, which has been redacted for public inspection, along with a Confidential Treatment Request

Sincerely,



Steven G. Bradbury

SGB
Enclosures

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October 14, 2016

CONFIDENTIAL MATERIAL ENCLOSED

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

ATTN: Rosemary McEnery
Deputy Chief
Market Disputes Resolution Division
Enforcement Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Re: Flat Wireless, LLC v. Celco Partnership d/b/a Verizon Wireless, EB Docket No. 15-147, File No. EB15-MD-005

Dear Ms. Dortch:

I am enclosing for filing in the above captioned proceeding Verizon's Opposition Brief. Verizon hereby requests Confidential treatment of the Opposition Brief pursuant to the protective order adopted by the Enforcement Bureau,¹ and sections 0.457(d)(2), 0.457(g)(3), 0.459 and 1.731 of the Commission's Rules, 47 C.F.R. §§ 0.457(d)(2), 0.457(g)(3), 0.459 and 1.731. Accordingly, the Confidential version of the brief may be used and disclosed solely in accordance with the limitations and procedures of 47. C.F.R. §§ 1.731(b)-(e).

The information for which Verizon seeks confidential treatment falls squarely within the requirements of Section 0.459 of the Commission's rules, and disclosure of this information would result in competitive harm to Verizon. In support of this request, Verizon provides the following information pursuant to Sections 0.457(d)(2) and 0.459(b) of the Commission's Rules.

¹ Protective Order, EB Docket No. 15-147, File No. EB-15-MD-005 (Aug. 31, 2015).

1. Extent of Nondisclosure Requested. Verizon is requesting confidential treatment under the Protective Order in this proceeding for the enclosed Opposition Brief, which is marked “Confidential,” and for the information therein designated with the markings “[BEGIN CONFIDENTIAL]” and “[END CONFIDENTIAL].” The documents and information subject to this request generally relate to commercial negotiations and arrangements between Verizon and Flat Wireless, LLC, Inc. (“Flat” or “Complainant”), and to commercial arrangements between Verizon and other entities, that are subject to non-disclosure agreements or that Verizon does not otherwise disclose publicly.
2. Proceeding/Reason for Submission. Verizon is submitting the enclosed information pursuant to Sections 1.724 and 1.729 of the Rules, 47 C.F.R. §§ 1.724, 1.729, and in accordance with the Enforcement Bureau’s July 15, 2015 letter to Verizon and Flat, the Enforcement Bureau’s September 2, 2015 grant of the parties’ Joint Motion to Revise Scheduling Order, the August 11, 2016 Conference of the parties and Enforcement Bureau, the September 6, 2016 Scheduling Order, and as part of Verizon’s Opposition Brief to Flat’s Initial Brief in the above-referenced proceeding.
3. Nature of Confidential Information. The information contains commercially sensitive information that may be withheld from public disclosure under FOIA Exemption 4. The Commission has long recognized that, for purposes of Exemption 4, “records are ‘commercial’ as long as the submitter has a commercial interest in them.” *Robert J. Butler*, 6 FCC Rcd 5414, 5415 (1991) (citing *Public Citizen Health Research Group v. F.D.A.*, 704 F.2d 1280, 1290 (D.C. Cir. 1983); *American Airlines v. National Mediation Board*, 588 F.2d 863, 868 (2d Cir. 1978)). The information is clearly “commercial”² in nature. It includes information relating to Verizon’s roaming pricing and agreements with other providers and Verizon’s offers to other carriers for roaming rates. This information relates to commercially sensitive and highly confidential agreements with other parties or the proposed terms for such agreements. Further, this

² See *Board of Trade v. Commodity Futures Trading Comm’n*, 627 F.2d 392, 403 & n.78 (D.C. Cir. 1980) (courts have given the terms “commercial” and “financial,” as used in Section 552(b)(4), their ordinary meanings).

information “would customarily not be released to the public.”³ Courts have elaborated that material “is ‘confidential’ . . . if disclosure of the information is likely to have *either* of the following effects: (1) to impair the government’s ability to obtain necessary information in the future; *or* (2) to cause substantial harm to the competitive position of the person from whom the information was obtained.”⁴ Both of these considerations plainly apply in this instance, as further explained in point (5) below.

4. Competitiveness of Market. The commercial information provided derives from and relates to Verizon’s provision of mobile wireless services and thus concerns a service “that is subject to competition,” 47 C.F.R. § 0.459(b)(4). *See, e.g., Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services*, 28 FCC Rcd 3700 (2013).
5. Harm from Disclosure. Disclosure of the commercial information in the enclosed opposition brief would likely cause significant competitive harm to Verizon. The information is sensitive, commercial in nature, and “would customarily not be released to the public.”⁵ Further, evidence revealing “[a]ctual competition and the likelihood of substantial competitive injury” is sufficient to bring commercial information within the realm of confidentiality.⁶ The Commission has recognized that disclosure of information relating to pricing, costs, business practices and methods and related information to competitors can cause competitive harm, and is thus competitively sensitive and subject to Exemption 4.⁷

³ *Critical Mass Energy Project v. NRC*, 975 F.2d 871, 873 (D.C. Cir. 1992), *cert. denied*, 113 S. Ct. 1579 (1993).

⁴ *National Parks and Conservation Ass’n v. Morton*, 498 F.2d 764, 770 (D.C. Cir. 1974) (footnote omitted) (emphasis added); *see also Critical Mass Energy Project v. NRC*, 975 F.2d 871 (D.C. Cir. 1992), *cert. denied*, 113 S. Ct. 1579 (1993).

⁵ *Critical Mass Energy Project v. NRC*, 975 F.2d 871, 873 (D.C. Cir. 1992), *cert. denied*, 113 S. Ct. 1579 (1993) (citing the Senate Committee Report).

⁶ *Public Citizen Health Research Group*, 704 F.2d at 1291, quoting *Gulf & Western Industries v. U.S.*, 615 F.2d 527, 530 (D.C. Cir. 1979).

⁷ *See, e.g., Josh Wein, Warren Communications News, Request for Inspection of Records*, Memorandum Opinion and Order, 24 FCC Rcd 12347, 12352-53 (2009).

6. Measures Taken to Prevent Unauthorized Disclosure. Verizon treats the documents and information subject to this request as confidential and subject to non-disclosure agreements, and does not publicly disclose this information. Verizon also limits the internal circulation of this information to only those with a need-to-know.
7. Public Availability and Previous Disclosure to Third Parties. The information designated Confidential is not made available to the public and has not been disclosed to parties other than the parties involved in the commercial relationships to which the information relates. The disclosure of confidential information to Flat Wireless is and has been subject to non-disclosure agreements and a protective order.
8. Requested Duration of Nondisclosure. The enclosed information should never be released for public inspection, as it contains commercially sensitive, confidential information, the release of which could adversely affect Verizon's competitive position.

For the foregoing reasons, Verizon respectfully requests that the Commission withhold these documents and information from public inspection, subject to the safeguards of section 1.731 of the Rules.

Should you need additional information with regard to this request, please contact the undersigned at (202) 261-3483.

Sincerely,



Steven G. Bradbury

SGB
Enclosures

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VERIZON

**Redacted for Public Inspection
Pursuant to Sections 0.457 and 0.459
of the Commission's Rules.**

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**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

In the Matter of)	
)	
Flat Wireless, LLC, for and on behalf of)	EB Docket No. 15-147
its Operating Subsidiaries,)	File No. EB-15-MD-005
)	
Complainant,)	
)	
v.)	
)	
Cellco Partnership d/b/a Verizon Wireless,)	
and its Operating Subsidiaries,)	
)	
Defendant.)	

VERIZON'S OPPOSITION BRIEF

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October 14, 2016

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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of)	
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its Operating Subsidiaries,)	File No. EB-15-MD-005
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Complainant,)	
)	
v.)	
)	
Cellco Partnership d/b/a Verizon Wireless,)	
and its Operating Subsidiaries,)	
)	
Defendant.)	

VERIZON'S OPPOSITION BRIEF

Flat Wireless, LLC ("Flat") has failed to carry the burden required to sustain its complaint in any respect. It has failed to show that the data roaming rates in Verizon's Best and Final Offer to Flat Wireless of September 16, 2016 are not "commercially reasonable" within the meaning of the Commission's *Data Roaming Order*,¹ that the voice roaming rate offered by Verizon violates the "reasonable and not unreasonably discriminatory" standard prescribed in the Commission's *Voice Roaming Orders*,² or that the extraordinarily low alternative rates Flat is demanding are compelled by the Commission's regulatory standards.³ For these reasons, the

¹ See *In the Matter of Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services*, Second Report and Order, 26 FCC Rcd 5411 ¶¶ 1, 13, 42, 68, 85-86 (2011) ("*Data Roaming Order*"); 47 CFR § 20.12(e)(1).

² See *In the Matter of Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services*, 25 FCC Rcd 4181 ¶ 18 (2010) ("*2010 Voice Roaming Order*"); *In the Matter of Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers*, 22 FCC Rcd 15817 ¶¶ 35, 37 (2007) ("*2007 Voice Roaming Order*"); 47 CFR § 20.12(d).

³ See FCC Enforcement Bureau Order, *NTCH, Inc. v. Cellco Partnership d/b/a Verizon Wireless*, DA 16-734, EB Docket No. 14-212 (Released June 30, 2016) ("*NTCH Order*") (denying similar complaint of NTCH, Inc. and rejecting same arguments now raised by Flat).

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Commission should deny Flat's complaint, just as it denied the similar complaint of NTCH, Inc. in its June 30, 2016 Order.

The evidence in the record clearly demonstrates that Verizon's proffered rates are entirely reasonable under the Commission's standards and well within the range of roaming rates Verizon has agreed to with other facilities-based carriers. Flat's proposed rates, on the other hand, are far below the roaming rates obtained by other carriers through arm's-length bargaining and are manifestly unreasonable.

The arguments in Flat's Initial Brief are essentially identical to the points previously laid out in its amended complaint, and, as discussed below, they largely repeat verbatim the arguments made by NTCH in its Initial Brief of September 18, 2015. Verizon has already fully responded to all of Flat's rehashed arguments in Verizon's Legal Analysis filed in this proceeding on October 9, 2015.⁴ In the interests of economy, Verizon hereby incorporates by reference its earlier Legal Analysis and will not repeat the points made there.

For present purposes, Verizon offers only two additional observations in response to Flat's Initial Brief.

First, Flat has again made no effort whatsoever to address the most important fact in this case: that the rates offered by Verizon are in line with the roaming rates established in arm's-length agreements negotiated with other competing wireless carriers, as demonstrated in Exhibit A appended to Verizon's Best and Final Offer. In fact, Verizon's proffered rates are at the low end of the range of contractual roaming rates agreed to with other facilities-based carriers, including in roaming relationships where Verizon is the net payer and even in agreements with

⁴ See Legal Analysis of Verizon, EB Docket No. 15-147, File No. EB-15-MD-005 (filed Oct. 9, 2015).

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roaming carriers that involve far greater roaming volumes than Flat could generate.⁵ The Bureau rejected NTCH's similar complaint for precisely this reason.⁶ Significantly, Verizon's September 16, 2016 Best and Final Offer to Flat includes data and voice roaming rates that are almost identical to those the Bureau recently found reasonable in the NTCH proceeding, and Flat has offered no grounds for not reaching the same conclusion here.⁷

At the same time, Flat ignores the fact that the rates it is demanding are far below any roaming rates agreed to by Verizon with any other comparably situated facilities-based carrier.⁸ The below-market rates demanded by Flat would destroy network investment incentives in contravention of the Commission's standards and policies.⁹

Second, Flat refuses to heed the analysis applied in the *NTCH Order* and chooses instead to defy the Bureau's Order. While dismissing as "quasi-monopolistic" the contractual roaming rates actually negotiated with numerous other carriers in the market (the best evidence of what rates are commercially reasonable), Flat doubles down on the very same alternative arguments expressly rejected in the *NTCH Order*. These include arguments for cost-based rate regulation of roaming agreements, arguments asking the Commission to dictate roaming rates based on the

⁵ [BEGIN CONFIDENTIAL]

[REDACTED] [END CONFIDENTIAL]

⁶ See *NTCH Order* ¶ 12 ("Verizon's proffered voice roaming rate in this case . . . is well within the range of comparable contractual rates."); *id.* ¶ 15 ("Here, Verizon's offered data rates are well within the range of rates in Verizon's other roaming agreements.").

⁷ Verizon's Best and Final Offer to Flat in this proceeding is [BEGIN CONFIDENTIAL]

[REDACTED] [END CONFIDENTIAL]

⁸ Cf. *id.* ¶ 15 ("NTCH's rate demand, by contrast, is dramatically lower than any contract rate between Verizon and any other CDMA wireless carrier.").

⁹ See *Data Roaming Order* ¶ 21; *2007 Voice Roaming Order* ¶ 40; *NTCH Order* ¶ 16.

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lowest retail pricing package offered by Verizon or the lowest wholesale terms given to the largest MVNOs, arguments condemning any variation in negotiated roaming rates as unlawfully “discriminatory,” and conclusory assertions about an unlawful “restraint of trade.” *See* Flat’s Initial Brief at 14-33. In its *NTCH Order*, the Bureau rejected each of these arguments as unconvincing, inconsistent with the Commission’s roaming orders, and inadequately supported.¹⁰

Flat complains that the Bureau’s *NTCH Order* “ignores the most solid and reliable metrics” for “what a reasonable rate . . . should be” and provides “no sound reason to prefer” a comparison with other contractual roaming rates over Flat’s cherry-picked benchmarks. Flat’s Initial Brief at 15. But Flat offers no new evidence or persuasive reasons for the Commission to reach any different conclusion here. Indeed, with remarkable disregard for the Bureau’s reasoning in the *NTCH Order*, Flat simply regurgitates word-for-word and number-for-number the exact same analyses on these points that NTCH submitted,¹¹ even though the Bureau explained in detail in the *NTCH Order* why it found NTCH’s analyses and arguments insufficient to sustain its complaint against Verizon.

¹⁰ *See NTCH Order* ¶ 14 (rejecting argument that Commission’s *Voice Roaming Orders* require uniform roaming rate based on “lowest” rate given to other carriers); *id.* ¶ 17 (rejecting as implausible and unsupported argument that Verizon’s proffered roaming rates amount to “an unlawful restraint of trade”); *id.* ¶¶ 19-21 (rejecting plea for cost-based roaming rates as inconsistent with Commission’s roaming orders); *id.* ¶ 22 (rejecting comparison to Verizon’s lowest retail pricing plan because it “employed a flawed methodology” and “does not offer a reliable reference point” for determining reasonableness of roaming rates); *id.* ¶ 24 (rejecting use of lowest MVNO rate as appropriate benchmark because the identified MVNO agreement “was not of comparable scale”).

¹¹ *Compare* Flat’s Initial Br. at 10-29, 33, with Initial Br. of NTCH, Inc. at 11-28, EB Docket No. 14-212 (filed Sept. 18, 2015). Flat acknowledges that its analysis of retail and wholesale rates relies on information provided in Verizon’s responses to interrogatories in the NTCH proceeding. Flat’s Initial Br. at 7. Apart from a passing reference to updated rate information supplied by Verizon, the only parts of Flat’s brief that are not lifted from the NTCH Initial Brief are (1) Flat’s criticisms of the *NTCH Order*, addressed above, (2) a paragraph discussing the Commission’s 2016 wireless competition report, which merits no response, and (3) frivolous arguments claiming that the Declaration of Dr. Hal J. Singer, submitted in support of Verizon’s Legal Analysis, somehow supports Flat’s complaint. *See id.* at 15, 12-14, 29-33. The latter argument repeats the antitrust claims rejected in the *NTCH Order* and misconstrues Dr. Singer’s Declaration. Contrary to Flat’s mischaracterization, the Singer Declaration simply explains from an economist’s perspective the business realities that distinguish a wireless carrier’s retail pricing and wholesale supply of service to MVNOs from the negotiation of roaming arrangements with competing facilities-based carriers and the analytical pitfalls of using one to evaluate the reasonableness of the other.

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For the reasons discussed above and in its Legal Analysis of October 9, 2015, Verizon respectfully urges the Commission to conclude that Verizon has satisfied the requirements of the Commission's roaming orders, to reject Flat's contrary arguments, and to deny and dismiss Flat's amended complaint.

Respectfully submitted,



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Counsel for Verizon

October 14, 2016

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PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based on the entire record in this proceeding, Verizon respectfully proposes that the Commission adopt the following Findings of Fact and Conclusions of Law:

Findings of Fact

1. Verizon responded promptly to each proposal from Flat concerning the terms of a potential new roaming arrangement, and Verizon acted reasonably and in good faith throughout its roaming negotiations with Flat.
2. The parties reached an impasse in roaming negotiations due to the substantial difference between the rates Flat demanded and the rates Verizon offered.
3. The voice roaming rate Verizon is offering to Flat is substantially below the voice roaming rate provided in the parties' current roaming agreement.
4. All of the roaming rates Verizon is offering to Flat are well within the range of other comparable roaming rates negotiated by Verizon in agreements with other CDMA wireless carriers, including both the roaming rates Verizon receives from other carriers and the roaming rates Verizon pays to other carriers, including under agreements where Verizon is the net payer.
5. The roaming rates Flat demands are substantially below the roaming rates agreed to in any contract between Verizon and any other comparable CDMA wireless carrier.
6. The roaming rates Flat demands have a significant potential to undermine the parties' incentives to invest in the buildout of new wireless infrastructure and to continue to invest in improvements in existing network facilities.

Conclusions of Law

1. The data roaming rates Verizon is offering Flat are "commercially reasonable" within the meaning of the Commission's *Data Roaming Order* and rules, and the voice roaming

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rate Verizon is offering is “reasonable and not unreasonably discriminatory” within the meaning of the Commission’s *Voice Roaming Orders* and rules.

2. Verizon satisfied the requirements and standards of the Commission’s roaming orders in its negotiations with Flat over a new roaming agreement.

3. The roaming rates Flat demands are unreasonable and do not conform to the standards established by the Commission’s roaming orders.

4. Flat’s plea for cost-based regulation of roaming rates is contrary to the settled standards for roaming rates established in the Commission’s roaming orders.

5. Flat has failed to show that certain retail pricing plans or wholesale rates are relevant reference points in evaluating reasonable roaming rates in this proceeding.

6. Flat’s assertions about the putative competitive effects of the roaming rates Verizon is offering are unsupported and do not provide any basis for relief in this proceeding.

CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of October, 2016 copies of the foregoing filing were delivered by courier to the following individual:

Donald J. Evans
Fletcher, Heald & Hildreth, P.L.C.
1300 N. 17th Street,
Suite 1100
Arlington, VA 22209



Hrishikesh N. Hari